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AUSPICIOUS JOURNEY SDN BHD

v.

EBONY RITZ SDN BHD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
HANIPAH FARIKULLAH J
[ORIGINATING SUMMONS NO: 24NCC-189-06-2013]
22 JANUARY 2014

C ***CIVIL PROCEDURE:*** *Striking out - Whether action should be struck out - Proceedings under s. 181 of Companies Act 1965 - Whether parties correctly cited as defendants*

D ***CIVIL PROCEDURE:*** *Parties - Misjoinder of parties - Proceedings under s. 181 Companies Act 1965 - Whether parties correctly cited as defendants - Whether defendants should cease to be parties - Rules of Court 2012, O. 15 r. 6*

Enclosure 12 was the fifth, sixth, eighth and ninth defendants' ('defendants') application pursuant to O. 15 r. 6(2)(a) of the Rules E of Court 2012 ('ROC') for an order that the defendants be struck out as parties of the originating summons. The plaintiff ('Auspicious Journey') and the second defendant ('Hoe Leong') held 20% and 80% of the shares respectively in the first defendant ('Ebony Ritz'). Ebony Ritz was a special joint venture vehicle F utilised by Hoe Leong and Auspicious Journey for purposes of their investment. Auspicious Journey claimed that the directors of Hoe Leong conducted the affairs of Ebony Ritz in a manner that was oppressive and in disregard of Auspicious Journey's interest and was prejudicial to Auspicious Journey as a member of Ebony G Ritz. Auspicious Journey subsequently sought an inquiry as to damages and an order that Hoe Leong's directors pay Ebony Ritz damages with interest. The defendants however contended that the originating summons were proceedings brought under s. 181 of the Companies Act 1965 ('s. 181 proceedings') which H concerned the affairs of Ebony Ritz. As a general rule, s. 181 of the Companies Act 1965 was intended to regulate affairs between the minority shareholder against an oppressive conduct either by the majority of the Board of the company or the majority shareholders. The defendants contended that they were not I directors of Ebony Ritz nor were they shareholders of Ebony Ritz and the relevant parties capable of answering the case of oppression were already cited, namely the majority of the Board

of the Ebony Ritz ('third and fourth defendants'), the majority shareholder of Ebony Ritz ('second defendant') and the external third parties ('tenth and eleventh defendants'). Thus, the defendants contended that pursuant to O. 15 r. 6 of the ROC, the defendants should cease to be parties in the proceedings.

Held (dismissing application in encl. 12 with costs):

(1) Non-members who were alleged to be responsible for a wrongdoing could be joined as respondents. Therefore, Hoe Leong and its directors which had been named as parties to the proceedings must remain as defendants to ensure that all matters in dispute between the parties could be determined and adjudicated upon. As the defendants were directors of Hoe Leong, the plaintiff should not be deprived of the opportunity of presenting his case against the defendants. (paras 25 & 27)

(2) To determine whether the defendants were connected to the unfair prejudicial conduct in question and whether it would be just in the context of s. 181 proceedings to grant remedy against the plaintiff was a matter which had to be considered during trial. If unfair prejudice conduct was established, the court would have to determine who would be found primarily liable for it. Therefore, the defendants were proper parties to the claim. (para 28)

Case(s) referred to:

Apex Global Management Ltd v. Fi Call Ltd and Ors [2013] EWHC 1652 ***(refd)***

Kejutan Holdings Sdn Bhd v. Magnum 4D (Perak) Sdn Bhd & Ors [2005] 2 CLJ 766 HC ***(refd)***

Ng Sing King And Others v. PSA International Pte Ltd And Others [2003] 3 SLR 591 ***(refd)***

Re Legal Costs Negotiators [1999] 2 BCLC 171 ***(refd)***

Re Little Olympian Each-Ways Ltd [1994] 2 BCLC 420 ***(refd)***

Re Oriental Gas Co Ltd [2000] 1 BCLC 209 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 181

Rules of Court 2012, O. 15 r. 6(2)(a)

A *For the plaintiff - Robert Low (Kelly Khoo with him); M/s Ranjit Ooi & Robert Low*
For the 2nd, 3rd & 4th defendants - SH Leong
For the 5th, 6th, 7th, 8th & 9th defendants - LC Tan; M/s Logan Sabapathy & Co
B *For the 10th & 11th defendants - M/s Malik Imtiaz Sarwar*

Reported by Sandra Gabriel

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JUDGMENT

Hanipah Farikullah J:

[1] Enclosure (12) is the fifth, sixth, eighth and ninth defendants' (the defendants) application pursuant to O. 15
D r. 6(2)(a) of the Rules of Court 2012 ("ROC") for an order that the fifth, sixth, eighth and ninth defendants be struck out as parties of the originating summons.

Background Facts

E **[2]** Before giving my views on the defendants application, it is necessary first to outline the background facts of the plaintiff's claim.

[3] The proceeding herein is brought pursuant to s. 181 of the
F Companies Act 1965.

[4] The subject matter of the suit is the first defendant ("Ebony Ritz"), in which the plaintiff ("Auspicious Journey") and the second defendant ("Hoe Leong") holds 20% and 80% of the shares respectively in Ebony Ritz.
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[5] Ebony Ritz is a special purpose joint venture vehicle utilised by both Hoe Leong and Auspicious Journey for purposes of their investment in Semua International Sdn Bhd ("Semua International").

H **[6]** The crux of Auspicious Journey's complaint involves various acts undertaken by, *inter alia*, Hoe Leong which infringes upon the rights of Ebony Ritz and Auspicious Journey. The acts of Hoe Leong are also alleged to be attributable to its directors.

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[7] In particular, the acts complained of specifically against Hoe Leong (attributable to them as directors of Hoe Leong) in the originating summons and plaintiff's first affidavit collectively (the "181 action"), may be summarised as follows:

(1) That Hoe Leong had expropriated the rights and interests of Ebony Ritz *inter alia* in relation to:

(a) Ebony Ritz's 2% call option;

(b) Ebony Ritz's rights and interests pertaining to the profit shortfall guarantee;

(c) Auspicious Journey's call option.

(2) The fifth, sixth, eighth and ninth defendants knew and/or ought to have known of:

(a) Hoe Leong's interest and investment in Ebony Ritz and the underlying agreements;

(b) Auspicious Journey's rights and interest and investment in Ebony Ritz;

(c) The rights and interests of Ebony Ritz including the affairs thereto.

[8] The following reliefs have also been claimed against the Hoe Leong directors including:

(a) Declaratory reliefs that *inter alia* the Hoe Leong directors:

(i) Are conducting the affairs of Ebony Ritz in a manner that is oppressive to and/or in disregard of Auspicious Journey's interest as a member of the Ebony Ritz.

(ii) Have procured and/or caused to be done and/or threatening to procure or cause to be done to Ebony Ritz which has had and/or will unfairly discriminate against or which is or will be otherwise prejudicial to Auspicious Journey as a member of Ebony Ritz;

(b) An inquiry as to damages, and, an order that *inter alia* the Hoe Leong directors do pay Ebony Ritz such damages as suffered and assessed, and with interest.

A **The Defendants Submissions**

[9] Learned counsel for the defendants submitted as follows:

(a) The originating summons here are proceedings brought under s. 181 of the Companies Act 1965 concerning the affairs of the target company namely the first defendant.

(b) As a general rule, the said s. 181 is intended to regulate the affairs between the minority shareholder against what is generally termed as oppressive conduct either by the majority of the board of the relevant company or the majority shareholders.

(c) However, in the present case:

(i) the fifth, sixth, eighth and ninth defendants are not directors of the target company namely the first defendant nor are they shareholders of the first defendant;

(ii) the relevant parties capable of answering the alleged case of oppression (including any relief) are already cited namely the majority of the board of the first defendant (namely third and fourth defendants), the majority shareholder of the first defendant (namely the second defendant) and those external third parties allegedly involved (namely the 10th and 11th defendants).

[10] Hence, learned counsel for the defendants contended that O. 15 r. 6 of the ROC regulates the procedure where unnecessary parties (in this case, the fifth, sixth, eighth and ninth defendants) seek an order that they cease to be parties in the present proceedings which should properly be confined to only the first, second, third, fourth, 10th and 11th defendants. In support of his argument learned counsel for the defendants referred me to a number of authorities in particular to the case of *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420.

[11] In *Re Little Olympian*, the question was whether it was proper for the subsequent holding company of a respondent (OAG) to also be added as a respondent to an oppression petition and to allow an amendment for the buy-out relief to be sought against OAG.

[12] Lindsay J, when confronted with the extent of jurisdiction in the award of buy-out relief against non-member in an oppression petition, observed (at pp. 429G-I to 430A-C of the report) as follows: A

> This summary suggests to me that in point of jurisdiction the wide language of ss. 459 and 461 is not to be cut down. None the less, cases may arise where, notwithstanding that the claim cannot be clearly said to be outside that wide jurisdiction, the likelihood of the court's discretion being exercised so as to lead to relief against, or relief having any material effect upon, a given respondent can be seen to be so remote that the case can fairly be described as 'perfectly hopeless', to use Hoffman J's phrase, and hence that it would be abusive to require that respondent to remain as such or to be added as such. Is this such a case? B C
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> It is best first to look at the likelihood or otherwise of OAG being ordered, with the other respondents, to buy the petitioner's shares - the only substantive relief sought against OAG in the amended petition. *Prima facie*, when a litigant's case against a person is within the relevant jurisdiction he should be permitted, if he so chooses, to pursue his case against that person. Thus I framed the question at the end of the last paragraph in the way that I did, rather than by reference to RSC Ord. 15, r. 6, because, on the facts of this case, where no blame can be laid at the petitioner's door for not including OAG from the outset or for delay in applying to amend, it seems appropriate to look at the petitioner's position more at it would be on an application for a strike out by OAG than where the petitioner comes cap in hand, as it were, asking for leave to amend. However, it is also to be borne in mind that it is plainly abusive to press a person into hopeless litigation, litigation which cannot succeed. Quite apart from other vexation inherent in litigation, even a party who recovers an order for his costs against a solvent party on an indemnity basis may well be left substantially out of pocket at the end of a s. 459 petition, a type of proceeding known neither for its speed nor its economy. D E F G

[13] Lindsay J further stated at pp. 430C-I to 431A-B of the report that: H

> At this point in the argument, Mr Aldous redeploys on the discretionary side of things many of the arguments used unsuccessfully (as I have held) on the jurisdiction. OAG is not and never has been a member of the company. OAG is not said to have controlled the company or its board or even to have had I

a nominee on the company's board. True it is that its wholly owned subsidiary, Newco, is a respondent but, as did Knox J in *Re Baltic Real Estate Ltd (No 1)*, I see it as no reason, sufficient in itself, for the joinder of a person as a further party that an existing respondent is owned by or controlled by that person. Newco can respond for itself and were there a principle that shareholders in or directors or controllers of a corporate respondent could, without more, be required to be parties in addition to that corporate respondent itself, then s. 459 would indeed be oppressive.

I thus see neither OAG's ownership of Newco nor the potential effect of the petition on Newco as being reason for OAG's joinder. It is said that beyond the buy-out required of it, OAG is affected by the relief sought in that its wholly owned subsidiary Newco may find itself holding its assets on constructive trust for, and may be liable to account to, others, but, again, the simple answer is, as I see it, that Newco, already a party, is able fully to deal with that, and if it sufficed, without more, to require a company to be respondent that the asses of a company in which it held shares might be affected by the relief sought that would, again, be a needlessly oppressive burden on corporations.

Mr Aldous emphasises that no substantive relief is sought against OAG in the petition save that it is sought that with six others (other than the company itself, and on the basis that Star is added) it should be a joint purchaser of the petitioner's shares in the company. There is no suggestion in evidence that the addition of OAG is necessary if there is to be a purchaser able to pay the price required or that the other respondents are of straw. There is nothing to suggest that a buy-out without OAG as a joint or several buyer is impracticable or impossible or that such an order against the original respondents would be worthless or nugatory As the original respondents include persons who are alleged to be the wrongdoers in relation to the acts complained of and who are said to have profited in substantial amounts from those acts, then if they, if ordered to be do so, would be able to buy - and it is nowhere said they would not be so able - Mr Aldous urges that no court is likely to find it necessary to join with them as a co-purchaser a party, OAG, against whom nothing wrong is urged. It is a strong course, he says, to require a party at what is likely to be considerable expense and against its will to become a shareholder in a company, a shell company, and to do so when the party is not said to have done anything wrong and where there are others who are wrongdoers and who are available as alternative purchasers. So to order, Mr Aldous urges, would

be remarkable, unprecedented and unnecessary. He goes on to show that the petition contains no allegation of any wrong done by OAG to the company; it is nowhere said the company has a cause of action against OAG.

[14] In the *Re Little Olympian* case, Lindsay J then proceeded to rule as follows (at pp. 432G-I of the report) that:

Although the court could, if it chose, make a buy-out order against OAG of the kind which the petitioner seeks, it is on the case put in the amended petition, even if wholly true, plain and obvious, in my judgment, that no court would make such an order. Had OAG been a respondent from the start it could, in my view, have successfully move to have the buy-out provisions and its role as a respondent struck out. It not yet being a respondent, it would be an abuse of process were it to be required, against its will, to be a respondent obliged to resist relief which would in practice never be granted.

[15] In *Re Oriental Gas Co Ltd* [2000] 1 BCLC 209 which followed the *Re Little Olympian* case, the court held that:

Mr Potts argued that one of the matters which the court should scrutinise is whether there is any real prospect that, assuming the unfairly prejudicial conduct alleged in the petition to be proved, the court will, under s. 461 of the Companies Act 1985, order Holdings to sell the Unitbuckle holding to the petitioners. He referred to a passage in the judgment of Lindsay J in *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420. In that case Lindsay J had to decide whether to allow an amendment to a s. 459 petition whereby a new respondent named OAG would be joined in the proceedings and an order would be sought requiring OAG, amongst other parties, to purchase the petitioner's shares. After considering the facts Lindsay J said (at 432):

> Although the court **could**, if it chose, make a buy-out order against OAG of the kind which the petitioner seeks, it is on the case put in the amended petition, even if wholly true, plain and obvious, in my judgment, that no court **would** make such an order. Had OAG been a respondent from the start it could, in my view, have successfully moved to have the buy-out provisions and its role as a respondent struck out. It not yet being a respondent, it would be an abuse of process were it to be required, against its will, to be a respondent obliged to resist relief which would in practice never be granted. (Lindsay J's emphasis)

A On these authorities I accept that it is appropriate for me, in considering whether or not to strike out the petition against any party, to ask myself whether it is plain and obvious that the relief sought against that party would never be granted.

B **[16]** *Re Little Olympian* case was also adapted by the Singapore case in *Ng Sing King And Others v. PSA International Pte Ltd And Others* [2003] 3 SLR 591.

[17] In *Ng Sing King* case, the plaintiffs, the first and second defendants are shareholders of the subject company. The first C defendant was a wholly owned subsidiary of the third defendant, while the second defendant was 99% owned by the fourth defendant. The third and fourth defendants (who are the non-members of the subject company) applied to remove themselves as parties to the oppression petition.

D **[18]** Tay Yong Kwang J held as follows: (at p. 599)

It can be seen that the general principle is that relief under s. 216 of the Companies Act is sought against members and directors of the company in issue and that an action under that provision E against non-members is exceptional. Indeed, where the court will not grant any relief against a non-member brought into proceedings, it would be an abuse of process of court to allow non-members to remain on the record.

F Here, it is undisputed that any buy-out order will affect only the first and the second defendants and these two defendants undoubtedly have the financial strength to comply with any such order whatever the value of the shares of the fifth defendant may eventually be determined to be. There is no indication what role the third and the fourth defendants have in such an eventuality. G Even the alternative claim for damages is nebulous. If a winding up order is made in respect of the fifth defendant, it will also have no implications for the third and the fourth defendants beyond the fact that a company in which their respective subsidiary has a one-third share is going to be liquidated.

H **[19]** Tay Yong Kwang J further said (at p. 599, para. 32 of the report) as follows:

The undisputed facts show that the first and second defendants are the contracting parties while the third and fourth defendants I are not. The shareholders' agreement of 29 September 2000 defines "PSA" as the first defendant and "P&O" as the second defendant. The statement of claim as pleaded disregards any

> distinction between corporate entities. What the plaintiffs are saying by this is that so long as a company indicates it belongs to a particular group of companies, any act done by one company in that group is tantamount to an act done by another company in that group. I do not think such a position is tenable because it will enlarge a s. 216 conflict to include shareholders of the shareholders of the company in question and directors of the parent company and controlling interests up the line.

[20] The English Court of Appeal in the *Legal Costs Negotiators* case [1999] 2 BCLC 171 in discussing the width of the jurisdiction and of the relief under the oppression petition held as follows:

> Mr Collings stressed the width of the jurisdiction and of the relief which may be granted. That is of course correct, but that is not to say that there is no limitations observable in the statutory language. Thus like the judge I too would lay emphasis on the need to show that it is the affairs of the company which are being or have been conducted in an unfairly prejudicial manner or that it is an act or omission of the company that is or would be so prejudicial. The conduct of a member of his own affairs, for example by requesting a general meeting of the company or seeking answers to an excessive number of questions, is irrelevant. Further, I would emphasise the limit imposed by statue on the relief which may be given under s. 461, *viz* the order is for giving relief in respect of the matters complained of. As Oliver LJ said in *Re Bird Precision Bellows Ltd* [1985] BCLC 493 at 500, [1986] Ch 658 at 669, the very wide discretion conferred on the court to do what it considered fair and equitable is 'in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company ... If the matters complained of have been put right and cured and cannot recur, it is hard to see how the court could properly give relief. Thus in *Re Estate Acquisition & Development Ltd* [1995] BCC 338 at 352 Ferris J pointed out that where the matter complained of is the failure to provide information to a member, the subsequent provision of information must be a material consideration:
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> > If only because the natural remedy for a failure to provide information is an order that the information be provided and there can be no purpose in making such an order when the information has in fact been provided before the order is made.

> The court on an application to strike out a s. 459 petition can look at the realities of the case. It is entitled to take the pragmatic view that the petition should not be allowed to proceed where the likelihood of the trial judge exercising his discretion to grant the claimed relief is so remote that the case can be described as perfectly hopeless (see *Re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420 at 429 and 432 per Lindsay J and *Re Oriental Gas Co Ltd* (4 February 1998, unreported) where Ferris J adopted what Lindsay J said in posing the test whether it is plain and obvious that the relief claimed would never be granted).

[21] In the light of the above authorities the defendants submitted that there is therefore no necessity to cite the external remote parties namely the fifth, sixth, eighth and ninth defendants as parties to the present s. 181 proceeding more so when there is no averment that the second, third, fourth, 10th and 11th defendants would not be in a position to satisfy any relief granted in these proceedings.

Issue

[22] The primary issue to be considered is whether the defendants should be struck out as parties in these proceedings.

Decision

[23] In the often cited case of *Re Little Olympian*, Lindsay J held that the following categories of persons could be names as a party in an appropriate case:

(a) A non-member of the company other than the company itself; or

(b) A person not involved in the acts complained of (if the person would be affected by the relief sought).

[24] In *Kejutan Holdings Sdn Bhd v. Magnum 4D (Perak) Sdn Bhd & Ors* [2005] 2 CLJ 766 (Tab 2), in dismissing the eighth and ninth respondent's application to strike out their names from the proceedings Ramly Ali J (now FCJ) held at pp. 778, 779, and 780 that:

> In the present case, in so far as the 8th and 9th respondents are concerned, the amended petition clearly specify the relief claimed against them on account of their participation in the two main elements in the so-called restructuring, i.e. the hiving off of the Core Business ...

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> In the face of these specific allegations it is imperative that the 8th and 9th respondents address or respond through affidavits the allegations contained in the petition against themselves. In the absence of credible explanation, these specific allegations contained in the petition must be accepted as true by the respondents thus making them necessary and proper parties to the proceedings...
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> ...
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> On that premise, the court finds that both the 8th and 9th respondents should stay as respondents to the present petition until completion, to ensure that all matters in dispute in the matter may be effectually and completely determined and adjudicated upon...The petitioner should not be deprived of the opportunity of presenting his case against both of them...the balance of justice between shutting out the petitioner and incurring inconveniences of the 8th and 9th respondents weighed in favour of allowing the petitioner to proceed against both the 8th and 9th respondents in the present petition.

[25] It is observed that in the recent English case of *Apex Global Management Ltd v. Fi Call Ltd and Ors* [2013] EWHC 1652 (Ch) at pp. 30-31, it was held that the non-members (who were directors in the company which held the shares in the subject matter company) who were alleged to have been responsible for a wrongdoing could be joined as respondents. These observations were made in the context of an application to set aside an order for leave to serve out of jurisdiction.

[26] As I have stated earlier, in this originating summons and the affidavit in support, the plaintiff *inter alia* alleged that:

(1) Hoe Leong had expropriated the rights and interest of Ebony Ritz *inter alia* in relation to:

   (i) Ebony Ritz's 2% call option;

   (ii) Ebony Ritz's rights and interests pertaining to the profit shortfall guarantee;

   (iii) Auspicious Journey's call option.

A (2) The fifth, sixth, eighth and ninth defendants knew and/or ought to have known of:

(i) Hoe Leong's interest and investment in Ebony Ritz and the underlying agreements;

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(ii) Auspicious Journey's rights and interest and investment in Ebony Ritz;

(iii) The rights and interests of Ebony Ritz including the affairs thereto.

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[27] In the light of the above allegations, Hoe Leong and its directors have been named as parties to the proceedings must remain as defendants to ensure that all matters in dispute between the parties may be determined and adjudicated upon. The

D defendants are directors of Hoe Leong. In my view, the plaintiff should not be deprived of the opportunity of presenting his case against the defendants (*Kejutan Holdings Sdn Bhd v. Magnum 4D (Perak) Sdn Bhd & Ors* [2005] 2 CLJ 766 followed).

E **[28]** However whether the defendants were connected to the unfairly prejudicial conduct in question that it would be just in the context of s. 181 proceedings to grant a remedy against them in relation to that conduct is a matter which has to be considered by this court when this matter goes for trial.

F **[29]** Further, if unfair prejudice is established, the court will have to determine who will be found primarily liable for it. (*Apex Global Management Ltd v. Fi Call Ltd and Ors* [2013] EWHC 1652 followed).

G **Conclusion**

[30] Based on the above reasons, I conclude that the defendants are proper parties to this claim. Accordingly, the defendants application is dismissed with costs of RM10,000.

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